

Ask the Probate Judge—Community Property & Revoking an A-B Trust

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Q: Am I correct that New Mexico is a community property state? Does that make an inheritance community property? My father in North Dakota passed away recently. He left a farm and the mineral rights to his six children. In case a well is drilled (and oil is found) on my father's farm, how could I safeguard the minerals for our two sons and two daughters? My husband and I have been married for many years, and everything we have worked for would be his in the event he outlives me. But I'm hoping that wouldn't have to include anything from my father's estate in the event of a future well if oil booms again. Would having my own separate will take care of such a situation? Thank you. M.O.

Yes, New Mexico is a community property state. To show that I remember my law training from Professor Occhialino's 1985 Family Law class, the acronym TWINCLAN, plus Wisconsin, represents the nine community property states in the United States. (TWINCLAN = Texas, Washington, Idaho, Nevada, California, Louisiana, Arizona, New Mexico.)

Generally, "community property" includes property acquired by either or both spouses during marriage that is not separate property. According to New Mexico's community property laws, property acquired during the marriage from the earnings or work of either spouse, by law, is owned one-half by each, no matter who earned the property or whose name appears on the title.

However, the law provides an exception for inheritances and several other types of property. "Separate property" includes: (1) property acquired by either spouse before marriage or after entry of a decree of dissolution of marriage; (2) property designated as separate property by a judgment or decree of a court; (3) property acquired by either spouse by gift, bequest, devise, or descent (this includes inheritances); and (4) property designated as separate property by a written agreement between the spouses, such as a prenuptial or postnuptial agreement.

As long as the spouse who receives an inheritance keeps it separate from the community property, the inheritance should retain its separate character.

If you were to die without a valid will, the laws of intestate succession would give your separate property one-fourth to your spouse and three-fourths to your children. But you are also correct that you may designate only your children as recipients of your separate property in your own will.

If you want your children to receive all of your separate inheritance, then hire a reputable attorney to assist you to ensure that your wishes are properly reflected in your will.

Q: We set up an A-B Living Trust several years ago, and now we're having second thoughts as to whether or not we should revoke the living trust and go back to a will to simplify things at the time of death of either of us. We don't have a large estate and our assets are mainly in CDs, IRAs and our home. How difficult would it be to revoke the trust and set up a will? Is it necessary to go through a lawyer to get this

accomplished? We read all of your articles in the Journal. Thank you. T.H., Rio Rancho

If your trust is revocable, you can “bust the trust” and revoke it. This would require you to sign a trust revocation and new wills. You would also need to change the titles on all assets held in the name of the trustee of the trust back into the individual names of you and your spouse. To make sure this is done correctly, consult a knowledgeable attorney.

If you were to take the assets you listed—CDs, IRAs, home—out of the trust, they could still be titled to pass to named beneficiaries without a court proceeding. By creating and recording a "transfer on death" (TOD) deed, you could avoid probating your house. "Payable on death" (POD) designations can be used to pass bank accounts, certificates of deposit, and U.S. savings bonds to named beneficiaries, assuming those beneficiaries survive you. "Transfer on death" designations pass stocks, bonds, and other investment securities automatically to named beneficiaries, assuming those beneficiaries survive you. If all assets have proper beneficiary designations, you may avoid a court proceeding without a living trust.

Write to Judge Rudd at P.O. Box 36011, Albuquerque, N.M., 87176-6011, or email jueznm@aol.com. The judge cannot answer questions about specific cases.

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